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Improving Protections for Whistleblowers: Why Congressional and Agency Intent Helped Provide the Second Circuit with the Correct Answer of Encouraging Reporting of Securities Violations

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Improving Protections for Whistleblowers: Why Congressional and Agency Intent Helped Provide the Second Circuit with the Correct Answer of Encouraging Reporting of Securities Violations

Alison M. Zeitlin¹

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INTRODUCTION

Daniel Berman ("Berman"), a finance director for Neo@Ogilvy LLC ("Neo"),¹ was shocked to find himself terminated after simply doing his job and complying with the law. Berman's primary responsibility at Neo was to ensure that Neo's accounting was executed in compliance with Generally Accepted Accounting Principles ("GAAP");² Berman was also responsible for tracking the internal accounting procedures of Neo.³ When Berman discovered that Neo was committing accounting fraud, he spoke up.⁴

Berman went to a senior officer at the company to report the violations that he was concerned about.⁵ Not only did Berman believe the practices violated GAAP, but he also thought that they violated both the Sarbanes-Oxley and Dodd-Frank Acts,⁶ both of which have the general purposes of preventing fraudulent activity and promoting transparency in the financial system. Shortly after reporting the alleged violations, his senior officer became angry with him. As a result, Berman was terminated.⁷

Retaliation against whistleblowers is prohibited under the Sarbanes-Oxley and the Dodd-Frank Acts.⁸ These anti-retaliation provisions are set out to encourage those who are aware of securities laws violations to come forward and bring the problems to light. Unfortunately for Berman, however, he did not report the potential violations to the Securities and Exchange Commission.⁹ Because of this fatal error, Berman was not afforded the anti-retaliation protections.¹⁰ This resolution of this apparent dichotomy is the heart of this Note, which advocates for courts to reach an outcome contrary to that in Berman's initial case.

In 2013, the Fifth Circuit held in *Asadi v. G.E. Energy U.S., LLC* that the anti-retaliation protections applied only to those individuals who reported directly to the Securities and Exchange Commission.¹¹ Shortly after the *Asadi* case

¹ Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 148 (2d Cir. 2015).

² The Generally Accepted Accounting Principles (GAAP) are a set of accounting principles, standards, and procedures used by companies in preparing their financial records. GAAP is prepared by the Financial Accounting Standards Board (FASB). There is a taxonomy published by FASB every year with regard to current GAAP. The 2016 version can be found at <http://www.fasb.org/cs/ContentServer?c=Page&pagename=FASB%2FPage%2FSectionPage&cid=1176164335312> [<https://perma.cc/H437-WCJ8>].

³ Berman, 801 F.3d at 149 (2d Cir. 2015).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 802 (2002) (codified at 15 U.S.C. 7201); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1744 (2010) (codified at 15 U.S.C. § 78u-6(21F)).

⁹ Berman, 801 F.3d at 149.

¹⁰ Luckily for Berman, the Second Circuit reversed the district court's decision to deny him the protection of the anti-retaliation provisions. *Id.* at 155. This case is discussed in detail later in this paper. See *infra* Section I.B.

¹¹ Asadi v. G.E. Energy (U.S.A.), L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).

concluded, Berman filed suit against Neo in the United States District Court for the Southern District of New York for violating the whistleblower protection provisions of the Dodd-Frank Act.¹² Now, more nearly two years later, the Court of Appeals for the Second Circuit has held that Berman may still have a chance.¹³ The Second Circuit, unlike the Fifth Circuit, found that the provisions were ambiguous and conflicting—enough to provide *Chevron* deference¹⁴ to the reasonable interpretation of the Securities and Exchange Commission in *Berman v. Neo@Ogilvy LLC*.¹⁵

This Note seeks to discuss the two circuit courts' discussions of the statute and the reason for the courts' different interpretations. Part I provides an analysis on the courts' reasoning, including which canons of statutory interpretation the courts used as bases to arrive at their differing conclusions. Part II analyzes different statutory interpretation arguments, both textual and substantive, and evaluates which arguments are beneficial for each circuit's outcome. Part III examines the policy arguments behind the Dodd-Frank Act and the implications of both circuits' outcomes. Part IV provides a recommendation for future courts to utilize when the issue arises.

I. FIGHTING OVER STATUTORY INTERPRETATIONS: WHY THE *ASADI* AND *BERMAN* COURTS DISAGREED

The issue that created this circuit split is a question of interpreting two different sections within the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The purpose of the Dodd-Frank Act is both to provide greater transparency in the financial system of the United States as well as to provide consumer protection against fraudulent or abusive acts.¹⁶ The statute makes the word "whistleblower" a defined term: "The term 'whistleblower' means any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."¹⁷ Later in the same statute, there is a prohibition against retaliation by employers:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of

¹² See *Berman*, 801 F.3d at 149.

¹³ See *id.* at 155.

¹⁴ *Chevron* deference occurs when a court grants deference to the relevant government agency's interpretation of a statute. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁵ See *id.* at 153, 155.

¹⁶ *Wall Street Reform: The Dodd-Frank Act*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> [<https://perma.cc/6KJT-2JLC>] (last visited Oct. 31, 2016).

¹⁷ 15 U.S.C. § 78u-6(a)(6) (2016) (emphasis added).

employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.¹⁸

Subsection (iii) of the anti-retaliation provision is where the heart of the dispute lies. This particular section cross-references the Sarbanes-Oxley Act of 2002 (enacted to protect investors and shareholders from fraudulent practices¹⁹), which contains provisions requiring individuals who are aware of potential securities laws violations to report them internally to the company before reporting them to the Securities and Exchange Commission.²⁰

The Fifth and Second Circuits are the only two circuits that have ruled on this particular statutory interpretation issue. On the other hand, since the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was passed, multiple district courts have attempted to interpret the statute and determine how the different sections relate.²¹ The trend in the district courts is to include those individuals who have reported only internally as “whistleblowers” under the statutory definition, and therefore allow those internal reporters to receive the benefit of the anti-retaliation protection provisions under the Dodd-Frank Act.²²

The Securities and Exchange Commission issued a rule before either circuit court made its decision as an attempt to clarify the interpretation of the statute.²³ Only one of the circuit courts, however, chose to use the Commission’s

¹⁸ *Id.* § 78u-6(h)(1)(A).

¹⁹ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. 7201).

²⁰ 15 U.S.C. § 7245 (2016). There are also provisions in the Sarbanes-Oxley Act that contain anti-retaliation protections for employees who report to someone “with supervisory authority over the employee.” See 18 U.S.C. § 1514A(a)(1)(C) (2016).

²¹ Although only two circuits have ruled on this issue, many district courts are familiar with it. See, e.g., *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 644–46 (E.D. Wis. 2014) (following the Fifth Circuit’s interpretation of the statute and holding that a whistleblower is required to report violations to the Securities and Exchange Commission in order to receive protection); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (holding that the statute is sufficiently ambiguous to warrant *Chevron* deference to the Securities and Exchange Commission’s rule).

²² See, e.g., *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993–94 (M.D. Tenn. 2012); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013).

²³ 17 C.F.R. § 240.21F-2 (2012) (defining whistleblower).

interpretation: the *Berman* court.²⁴ While the *Asadi* court read the statute sections as compatible,²⁵ the *Berman* court found that there was sufficient ambiguity to warrant deference under *Chevron* to the related governmental agency; here, the Securities and Exchange Commission.²⁶

The next two Subsections of this Note will analyze each court's decision, focusing primarily on each court's reading of the statute, along with whether or not the courts included reference to the purpose of the statute or the policy behind it.

*A. "Perceived Conflict" not Present with Plain Language Reading:
The Fifth Circuit Holds that Reporting to the Securities and
Exchange Commission is Vital*

In 2013, the Fifth Circuit Court of Appeals analyzed the Dodd-Frank Act's plain language and affirmed the district court's dismissal for failure to state a claim under Rule 12(b)(6) because the plaintiff-appellant did not fall within the definition of "whistleblower" under the Act.²⁷ The plaintiff-appellant, Khaled Asadi, was an executive for G.E. Energy in Amman, Jordan.²⁸ In 2010, about four years after he began working for G.E. Energy, Asadi received a tip that G.E. Energy had hired someone that was associated with an Iraqi official in order to successfully negotiate a joint venture agreement.²⁹ Asadi reported this information to his supervisor because he was concerned that it violated the Foreign Corrupt Practices Act.³⁰ Shortly after he reported the suspicious activity, the company began to retaliate against him.³¹ The company pressured him to step down and gave him "surprisingly negative" performance reviews.³² Within one year of reporting the suspicious activity to his supervisor, G.E. Energy fired him.³³

Asadi brought the claim against G.E. Energy, alleging that the company violated the Dodd-Frank Wall Street Reform and Consumer Protection Act of

²⁴ See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

²⁵ See *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620, 629–30 (5th Cir. 2013).

²⁶ See *Berman*, 801 F.3d at 155.

²⁷ *Asadi*, 720 F.3d at 621.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* One of the purposes of the Foreign Corrupt Practices Act (FCPA) is to prevent bribery of foreign officials. *Foreign Corrupt Practices Act: An Overview*, U.S. DEPT. JUST., <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> [https://perma.cc/X8BG-54YR] (last updated July 20, 2016). Violations of the FCPA may lead to charges by the Securities and Exchange Commission. 15 U.S.C. § 78dd-1 (2016). Interestingly, G.E. Energy later settled a FCPA claim. Marcus Baram, *General Electric Whistleblower Says He Was Fired for Raising Concerns About Potential Corruption*, HUFFINGTON POST (Feb. 8, 2012), http://www.huffingtonpost.com/2012/02/08/general-electric-whistleblower_n_1262207.html [https://perma.cc/TK5B-SBAW]. It is unknown whether or not the claim was related to the violation that Asadi reported. See *id.*

³¹ *Asadi*, 720 F.3d at 621.

³² *Id.*

³³ *Id.*

2010.³⁴ The question before the Fifth Circuit was “whether an individual who is not a ‘whistleblower’ under the statutory definition of that term in § 78u-6(a)(6) may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision.”³⁵

The court’s analysis focused exclusively on the text of the Dodd-Frank Act statute.³⁶ The court also set forth the principles of statutory interpretation that were relevant to the case, effectively reminding the reader that the statutory language is more important than the policy argument behind the language.³⁷ Specifically, the court noted a few important principles. First, if statutory text is “plain and unambiguous,” it must be applied “according to its terms.”³⁸ To determine if the text is plain and unambiguous, the court must reference “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”³⁹ Second, the court should give effect “to every word and every provision Congress used.”⁴⁰ Finally, provisions of a statute should be read to be “compatible, not contradictory.”⁴¹

According to the court, the text in § 78u-6(a)(6) is express and unambiguous in limiting the protection to whistleblowers as defined—those who provide information to the Securities and Exchange Commission only.⁴² Although Asadi conceded that he did not fit expressly within that definition because he only reported the information internally, he argued that the section regarding whistleblower protection conflicts with the section regarding the definition of a whistleblower.⁴³ He based his argument on the fact that an individual can take actions that are protected under § 78u-6(h)(1)(A)(iii) but still fail to qualify as a “whistleblower” as defined in § 78u-6(a)(6) if the individual does not report the information to the Commission.⁴⁴

Subsection (h) of § 78u-6 is titled “Protection of whistleblowers.”⁴⁵ Under this subsection, there is a paragraph regarding prohibition against retaliation.⁴⁶ This paragraph contains language that, according to Asadi, conflicts with the definition as given by 15 U.S.C. § 78u-6(a)(6).⁴⁷ This language states that an employer may not retaliate against a whistleblower that makes “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.”⁴⁸

³⁴ *Id.*

³⁵ *Id.* at 623.

³⁶ *Id.* at 623 (“We start and end our analysis with the text of the relevant statute . . .”).

³⁷ *See id.* at 622.

³⁸ *Id.* (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)).

³⁹ *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

⁴⁰ *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

⁴¹ *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

⁴² *Id.* at 623.

⁴³ *Id.* at 624.

⁴⁴ *Id.*

⁴⁵ 15 U.S.C. § 78u-6(h) (2016).

⁴⁶ *Id.*

⁴⁷ *Asadi*, 720 F.3d at 624–25.

⁴⁸ § 78u-6(h).

Asadi's argument was based on the fact that the Sarbanes-Oxley Act of 2002 contains anti-retaliation provisions that extend protections not only to those who report information to the Securities and Exchange Commission, but also to those who report information internally to a supervisor within the individual's company.⁴⁹ Further, Asadi argued that if § 78u-6(h)(1)(A)(iii) was considered to apply only to those who report to the Commission, it would effectively render the words "to the Commission" superfluous in the definition section.⁵⁰

Denying Asadi's argument, the court ruled that reading the statute in the way Asadi suggested would render "the [Sarbanes-Oxley Act] anti-retaliation provision, for practical purposes, moot."⁵¹ In particular, the court noted the differences between the Dodd-Frank Act and the Sarbanes-Oxley Act and why they should not be treated the same, even though they may have similar objectives.⁵² In the end, the court effectively stated that the Dodd-Frank Act is a better option than the Sarbanes-Oxley Act for an individual with knowledge of a potential violation seeking whistleblower protections.⁵³

The differences that the court points out are significant. First, the court recognizes that the anti-retaliation provisions in the Dodd-Frank Act provide the individual greater monetary damages than the similar provisions in the Sarbanes-Oxley Act.⁵⁴ Specifically, the Dodd-Frank Act allows for two times the monetary damages that the Sarbanes-Oxley Act allows for.⁵⁵ Second, the steps an individual must take before filing an anti-retaliation claim under the Dodd-Frank Act are more numerous for those bringing a claim under the Sarbanes-Oxley Act.⁵⁶ Individuals bringing a claim under the Dodd-Frank Act may bring a claim without filing a claim to a federal agency, but individuals bringing a claim under the Sarbanes-Oxley Act must file a complaint with the Secretary of Labor beforehand.⁵⁷ Finally, the statute of limitations is longer for the Dodd-Frank Act whistleblower claims than it is for the Sarbanes-Oxley Act whistleblower claims.⁵⁸ In fact, the Dodd-Frank Act's statute of limitations is at least five and a half years longer than the Sarbanes-Oxley Act's statute of limitations.⁵⁹

The differences in the statutes of limitations and allowances for monetary damages are particularly significant. An individual wishing to bring an anti-retaliation claim clearly would rather bring their claim under the Dodd-Frank Act because of the benefits of higher damages, but the court in *Asadi* argues that these differences are present to encourage an individual with information to report to the

⁴⁹ *Asadi*, 720 F.3d at 624–26.

⁵⁰ *Id.* at 628.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.* at 628–29.

⁵⁴ *Id.* at 629.

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Compare 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2016), with 18 U.S.C. § 1514A(b)(2)(D) (2016).

Securities and Exchange Commission, not just internally to the company that he or she works for.⁶⁰

In fact, the court's argument was that the "perceived conflict" between the two sections, § 78u-6(a)(6) and § 78u(6)(h)(1)(A)(iii), were actually not in conflict at all.⁶¹ The court proposed a hypothetical situation in which a mid-level manager of a company becomes suspicious of a securities law violation.⁶² Upon discovery of the situation, the manager reports the information to two entities: (1) the company's chief executive officer and (2) the Securities and Exchange Commission.⁶³ Immediately after reporting it, the manager is fired by the chief executive officer.⁶⁴ The court notes that the chief executive officer may not be aware that the manager reported it to the Commission right away; the implication being that the chief executive officer may not realize he or she may be liable under the Dodd-Frank or Sarbanes-Oxley Act.⁶⁵ Because the manager reported the information to the Commission, he is considered a "whistleblower" under the statutory definition in the Dodd-Frank Act.⁶⁶ But, according to the court, the manager "would be unable to prove that he was retaliated against because of the report to the SEC," because the chief executive officer was not aware of the report to the Commission.⁶⁷ Therefore, he would not be protected under the first and second category of protected activity in the Dodd-Frank Act, because the retaliation would not be as a result of reporting the potential violation to the Commission. He would, however, be protected under the third category of protected activities because he made a disclosure that was required or protected under the Sarbanes-Oxley Act by reporting the information internally to his chief executive officer.⁶⁸

This hypothetical is one of the reasons for disagreement cited by the circuit court that later split from the Fifth Circuit's holding.

B. "Sufficient Ambiguity" when Considering Superfluous Language and Legislative Intent: The Second Circuit Splits with the Fifth and Holds that Internal Reporting is Enough

Two years after the *Asadi* decision, the Second Circuit Court of Appeals held that an individual does not have to report information to the Securities and Exchange Commission in order to be considered a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act, as long as the individual reports the information internally to the company he or she works for.⁶⁹

⁶⁰ See *Asadi*, 720 F.3d at 623.

⁶¹ *Id.* at 625.

⁶² *Id.* at 627.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *id.* at 627–28.

⁶⁶ *Id.* at 627.

⁶⁷ *Id.*

⁶⁸ *Id.* at 627–28; 15 U.S.C. § 78u-6(h)(1)(A) (2016).

⁶⁹ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

These two circuits are the only two to rule on this particular question, although district courts are divided on how to interpret the statute.⁷⁰

Plaintiff-appellant Berman was a director at Neo starting in 2010.⁷¹ His responsibilities included reporting the company's financial information and ensuring that both the company's and its parent corporation's internal accounting procedures complied with GAAP.⁷² While employed at the company, Berman discovered multiple accounting practices that he believed were not in compliance with GAAP and therefore constituted accounting fraud.⁷³ He reported the violations internally to a senior officer, but he did not report any violations to the Securities and Exchange Commission (while he was employed at the company—he later informed the Commission, but it was after the statute of limitations had run for Dodd-Frank Act claims).⁷⁴ Berman was terminated.⁷⁵

The district court ruled that § 21F(h)(1)(A)(iii) provided protection only to individuals who were considered whistleblowers under the statute—those who report alleged violations to the Commission.⁷⁶ Therefore, the district court dismissed Berman's Dodd-Frank claims because he had been terminated before he reported the alleged violations to the Commission.⁷⁷

The Second Circuit reversed the decision of the district court.⁷⁸ The appeals court recognized that its decision was going to create a circuit split, but noted that a larger number of district courts have held that the statute is sufficiently ambiguous enough to allow deference to the relevant agency, the Securities and Exchange Commission: "Thus, although our decision creates a circuit split, it does so against a landscape of existing disagreement among a large number of district courts."⁷⁹

Unlike those in *Asadi*, the judges in *Berman* were not in agreement on the holding. Here, the dissenting judge agreed with the opinion from *Asadi*, arguing that an individual should not be afforded Dodd-Frank anti-retaliation protections unless he or she reports the information to the Commission.⁸⁰ A brief discussion of this dissent's reasoning will follow the analysis of the majority opinion.

As mentioned earlier, the majority in *Berman* was not convinced by the hypothetical situation proposed in *Asadi*. Here, the court noted that the "possibility of simultaneous complaints" was the main idea in persuading the *Asadi* court that the definition of whistleblower could be considered consistent with the protected situations in Dodd-Frank.⁸¹ In fact, the court was able to articulate multiple

⁷⁰ See *supra* note 20 and accompanying text.

⁷¹ *Berman*, 801 F.3d at 148.

⁷² *Id.* at 148–49.

⁷³ *Id.* at 149.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 155.

⁷⁹ *Id.* at 153.

⁸⁰ See *id.* at 155–60 (Jacobs, J., dissenting).

⁸¹ *Id.* at 151.

reasons as to why this reading of the statute would give the provision “extremely limited scope”—which serves as an argument as to why there is ambiguity among the sections of the statute.⁸²

The most important discussion that the *Berman* court makes is that of whether *Chevron* deference should be given in this statutory interpretation. The determination of whether *Chevron* deference applies is a two-step process. First, the court must consider if there is an “unambiguously expressed intent of Congress” with regard to “the precise question at issue.”⁸³ Second, if the statute is either ambiguous or silent, the court must consider if the relevant agency’s interpretation is “based on a permissible construction of the statute.”⁸⁴

The *Berman* court noted a few cases in which the court did not apply express terms because it “yielded a result so unlikely to have been intended by Congress that the Supreme Court did not apply those terms.”⁸⁵ *Berman* noted the most recently decided case of *King v. Burwell*, in which the Supreme Court interpreted a statute that stated “established by a state” to mean “established by the State or the Federal Government.”⁸⁶ Also, it conceded that if an employee were to simultaneously report potential securities law violations to both his or her employer internally and to the Securities and Exchange Commission, the employee would be eligible for both Dodd-Frank and Sarbanes-Oxley anti-retaliation protection remedies, so there is no *absolute* conflict between the definition statute and the protection statute.⁸⁷ But, lack of conflict will exist only in extremely rare circumstances, leaving protection of the third category of acts with exceedingly limited scope.⁸⁸

First, the court voiced a concern for the individuals who are put in the situation of discovering a wrongdoing. When an individual discovers the information, he or she is put in a difficult situation—to do the right thing and potentially risk losing his or her job, or to stay silent and keep his or her job. This sentiment is expressed by the court’s recognition that an individual may believe that reporting the information to only his or her employer carries less risk than reporting to a government agency, namely the Securities and Exchange Commission.⁸⁹ Since the enactment of new whistleblower rules in August 2011, the amount of tips received by the Commission from whistleblowers has increased by more than thirty

⁸² *Id.*

⁸³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁸⁴ *Id.* at 843.

⁸⁵ *Berman*, 801 F.3d at 150 (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892)).

⁸⁶ *Berman*, 801 F.3d at 150 (quoting *King v. Burwell*, 135 S.Ct. 2480, 2490, 2496 (2015)).

⁸⁷ *Berman*, 801 F.3d at 150. The court admits that there is no absolute conflict; instead, it rests its argument on the fact that this lack of conflict exists only in very rare situations. *Id.* at 152.

⁸⁸ *Id.* at 151.

⁸⁹ *Id.*

percent.⁹⁰ This conveys the overall trend that employees will report if they believe that they will be protected against retaliation from their employers.

Next, the court argued that the most significant impact of reading the statute as the *Asadi* court suggests is that particular categories of whistleblowers will not be protected by the statute, even if they wish to report the information to the Commission.⁹¹ Particularly, auditors and attorneys will not necessarily be able to obtain “whistleblower” status as the *Asadi* court describes.⁹²

This will surely send a chill up most attorneys’ spines. Under both Sarbanes-Oxley provisions and the Commission’s Standards of Professional Conduct, attorneys of public companies *must* report potential securities law violations to either the chief legal counsel or chief executive officer of the company before taking further action.⁹³ If the chief legal counsel or chief executive officer does not act on the information and respond accordingly, the concerned attorney then must report the potential violation to an audit committee or the board of directors.⁹⁴ Only after this internal reporting is done can an attorney then bring the information to the Commission.⁹⁵ The justification for requiring this internal reporting before allowing the attorney to report to the Commission is that it preserves client confidentiality and protects information.⁹⁶ Although confidentiality may be preserved, the attorney’s job might not be. Retaliation would likely happen well before the attorney had the opportunity to report the information to the Commission, as the process requirements before reporting to the Commission leave management ample time to make decisions with regard to the attorney’s employment.

Similar to attorneys, auditors of public companies are required under Sarbanes-Oxley to “inform the appropriate level of management” when they believe they have discovered illegal activity, with a few exceptions.⁹⁷ If, after reporting to the management, there is no remedial action taken, the auditor must report the information to the board of directors of the company.⁹⁸ Only after the board or the management fails to take remedial action may the auditor report the illegal activity to the Commission.⁹⁹ *Berman* emphasizes the lack of simultaneity that these requirements will cause between reporting the discovered information internally and to the Commission and explains that an auditor would likely not be afforded

⁹⁰ SEC, 2015 ANN. REP. TO CONGRESS ON DODD-FRANK WHISTLEBLOWER PROGRAM 1, <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf> [<https://perma.cc/JBU4-WJS8>].

⁹¹ *Berman*, 801 F.3d at 151–52.

⁹² *Id.* at 151.

⁹³ *Id.* at 151–52; *see also* 15 U.S.C. § 7245 (2016).

⁹⁴ *Berman*, 801 F.3d at 152.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 151 (quoting 15 U.S.C. § 78j-1(b)(1)(B)).

⁹⁸ *Id.* (citing 15 U.S.C. § 78j-1(b)(1)(B)).

⁹⁹ *Id.*

Dodd-Frank protection, and, more importantly, would likely be retaliated against before the issue could be reported to the Commission.¹⁰⁰

Because the court found the effect of the reporting requirement “sharply limiting,” the *Berman* court, unlike the *Asadi* court, attempted to evaluate legislative history to ascertain legislative intent.¹⁰¹ Unfortunately, there is little in the way of legislative history because the particular section was not included in the version of Dodd-Frank that was passed prior to a conference.¹⁰² There is, however, one note from the House Conference Report in 2009 about enhancing incentives for whistleblowers: “The subtitle further enhances incentives and protections for whistleblowers providing information leading to successful SEC enforcement actions.”¹⁰³

Finally, the court discussed the superfluous nature of the differences between the two requirements.¹⁰⁴ It also notes what legislative realities may bring:

All these arguments ignore the realities of the legislative process. When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of “whistleblower” do not fit together neatly. The definition speaks of reporting to the Commission, but subdivision (iii) incorporates Sarbanes-Oxley provisions, which contemplate internal reporting, without reporting to the Commission. Subdivisions (i) and (ii), which were included in the Senate version of Dodd-Frank before the conferees met, fit precisely with the “whistleblower” definition. Subdivision (i) explicitly requires reporting “to the Commission,” and subdivision (ii) concerns assisting action “of the Commission,” whereas the terms of subdivision (iii) do neither.¹⁰⁵

This discussion led the court to determine that the conferees that were the last to accept the insertion of the particular subdivision would not have expected it to have the extremely limited scope that it currently has according to the *Asadi* ruling.¹⁰⁶ Based on this discussion, the court held that the sections were sufficiently ambiguous, and therefore gave *Chevron* deference to the relevant agency.¹⁰⁷ That

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 152.

¹⁰² *Id.*

¹⁰³ H.R. REP. NO. 111-517, at 870 (2010)).

¹⁰⁴ *Berman*, 801 F.3d at 153–54.

¹⁰⁵ *Id.* at 154 (internal footnotes omitted).

¹⁰⁶ *Id.* at 155.

¹⁰⁷ *Id.*

agency, in this situation, was the Securities and Exchange Commission.¹⁰⁸ Because the Commission had already given an interpretive ruling on that matter, the court adopted that rule, allowing Berman to be protected under the Dodd-Frank Act.¹⁰⁹

II. APPEARANCES CAN BE DECEIVING: ALTHOUGH PLAIN LANGUAGE SEEMS CLEAR, A DEEPER LOOK AT CONTEXT REVEALS CONFLICTS AND LIMITATIONS

A. The Plain Language Meaning of the Statute: "To the Commission" Means "To the Commission"

As mentioned earlier, the *Asadi* court primarily focused on what most Supreme Court decisions do: the plain language meaning of the statute at issue.¹¹⁰ If the statute is unambiguous, then the "first canon [of statutory interpretation] is also the last: 'judicial inquiry is complete.'"¹¹¹ In order to understand the meaning of the statute at issue, the court should look at the statute as a whole.¹¹² This approach was followed by Justice Scalia: "Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . ."¹¹³

If, for example, a statute defines a specific word in a definitions section, that definition controls when used in the rest of the statute.¹¹⁴ In *Colautti v. Franklin*, the appellants argued that the term "viable" was synonymous with "may be viable" in a statute regarding abortion.¹¹⁵ The court rejected this argument, however, stating that because the word "viable" was defined in the statute, the definition given was intended to be the sole meaning of the word when used in the other provisions of the statute: "[T]he suggestion that 'may be viable' is an explication of the meaning 'viable' flies in the face of the fact that the statute . . . already defines 'viable.' This, presumably, was intended to be the *exclusive* definition of 'viable' throughout the Act."¹¹⁶

Similarly to *Colautti*, in *Asadi* and *Berman*, the term at issue, "whistleblower," is a defined term within the statute.¹¹⁷ The plain language of the definition of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013).

¹¹¹ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

¹¹² *See, e.g., Maimonides Med. Ctr. v. United States*, 54 F. Supp. 3d 194, 203 (E.D.N.Y. 2014).

¹¹³ *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (internal citations omitted).

¹¹⁴ *Colautti v. Franklin*, 439 U.S. 379, 392–93 (1979).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 392 (emphasis added).

¹¹⁷ *See* 15 U.S.C. § 78u-6(a)(6) (2016).

"whistleblower" indicates that in order to be considered an individual within the defined term, that individual must report the information *to the Commission*.¹¹⁸ Both individuals seeking whistleblower protection in *Asadi* and *Berman* argued that the term also includes individuals who report the information internally.¹¹⁹ As in *Colautti*, the suggestion that "to the Commission" means "to the Commission or internally to the company" "flies in the face" of the fact that the statute expressly defines the term "whistleblower" to not include "internally to the company."¹²⁰ Based on the *Colautti* analysis alone, it would seem as though the *Asadi* court was correct in holding that individuals who reported violations solely internally within the company were not protected by the anti-retaliation provisions in the Dodd-Frank Act. Yet, there is a unique difference from *Colautti*: the term defined in *Asadi* and *Berman* is used in a way that would give the statute extremely limited scope.

B. The Plain Language Meaning is "Necessarily Ambiguous," Leaving the Statute With Conflicting Provisions and Extremely Limited Scope

According to Judge Learned Hand, the court must always "remember that statutes always have some purpose or object to accomplish," instead of focusing just on the pure definition of a word.¹²¹ Looking at the plain language strictly in terms of the defined term of "whistleblower" as analyzed above disregards the fact that the provision does not further the purpose the statute sought to accomplish—encouraging individuals with knowledge of securities laws violations to come forward and to disclose the potential violations.

When interpreting statutes, the court should construe the statute so that "effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant"¹²² Although a term that is used throughout a statute is generally given the same definition each time it appears, this presumption "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."¹²³ If the plain language interpretation produces an "absurd result," then it should be rejected.¹²⁴

¹¹⁸ *Id.*

¹¹⁹ See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 147 (2d Cir. 2015).

¹²⁰ *Colautti*, 439 U.S. at 392. There is, however, a small difference between the term at issue in *Asadi* and *Berman* versus that in *Colautti*. In *Colautti*, the term at issue was the term defined, not part of the definition of a term. *Id.* at 392–93. In *Asadi* and *Berman*, the term at issue is "to the Commission" within the definition of "whistleblower." See *supra* text accompanying notes 49–50, 79.

¹²¹ *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

¹²² *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 6th ed. 2000)).

¹²³ *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

¹²⁴ See, e.g., *United States v. Granderson*, 511 U.S. 39, 47–48 n.5 (1994).

The Supreme Court has seen a case before in which, although the statutory definition seemed to expressly give an exclusive meaning to a word, the plain meaning ended up being overcome because of the ambiguous application to use in the rest of the statute. In *Robinson v. Shell Oil Co.*, the term at issue was the word “employee,” which was defined in the statute as “an individual employed by an employer.”¹²⁵ Even though the term was expressly defined in the statute, as in *Culoutti*, the court questioned whether it should be applied in different sections of the statute due to various uses of the word.¹²⁶ While the word “employee” is used consistently with the unambiguous express definition in some sections, other sections clearly use the word “employee” to mean something more inclusive than just an employee currently employed by the employer.¹²⁷ For example, two sections use the term to discuss current employees, involving different standards of compensation for “employees who work in different locations,”¹²⁸ and establishing plans “to provide a maximum opportunity for employees to advance so as to perform at their highest potential.”¹²⁹ On the other hand, other sections use the term to discuss former employees, “reinstatement or hiring of employees,”¹³⁰ and employees aggrieved by the final disposition of their complaint being eligible to file a civil action.¹³¹

The court held that the term was ambiguous because of the difference in meanings between the different sections:

But those examples at most demonstrate that the term “employees” may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts. Once it is established that the term “employees” includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.¹³²

The court solved the ambiguity by looking at the other sections of the statute, the position taken by the relevant agency, and the “primary purpose of the antiretaliation [sic] provisions: Maintaining unfettered access to statutory remedial mechanisms.”¹³³ Based on these factors, the court held that the term “employees”

¹²⁵ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997) (quoting 42 U.S.C. § 2000e(f) (1997)).

¹²⁶ *Id.* at 341–42.

¹²⁷ *Id.*

¹²⁸ 42 U.S.C. § 2000e-2(h) (1997).

¹²⁹ *Id.* § 2000e-16(b).

¹³⁰ *Robinson*, 519 U.S. at 342; 42 U.S.C. § 2000e-5(g)(1).

¹³¹ 42 U.S.C. § 2000e-16(c).

¹³² *Robinson*, 519 U.S. at 343–44.

¹³³ *Id.* at 345–46.

included both former and current employees, even though the definition seemed to include only current employees when looked at using the plain language interpretation of the statute.¹³⁴

Robinson is nearly on point with the issue in *Asadi* and *Berman*. The definition in the Dodd-Frank Act seems to give an express definition of the word “whistleblower” by including the term “to the Commission.”¹³⁵ Admittedly, the plain language of the definition seems to indicate that an individual must report potential securities laws violations to the Securities and Exchange Commission in order to be afforded the protection of the anti-retaliation provisions, as discussed above.¹³⁶ Nevertheless, like *Robinson*, some sections of the statute do not seem to fit with that limited definition—specifically, subsection (iii) of the anti-retaliation provisions.¹³⁷ The subsection requires that the definition of whistleblower be extended to individuals who report violations internally to the company as well.¹³⁸ Analogous to *Robinson*, since the term seems to include different individuals in some sections than others, the term is “necessarily ambiguous.”

III. SUFFICIENT AMBIGUITY WARRANTS NOT ONLY *CHEVRON* DEFERENCE TO THE SECURITIES AND EXCHANGE COMMISSION, BUT ALSO TO POLICY CONSIDERATIONS ACCORDING TO *ROBINSON*

The next step in determining the definition of “whistleblower” according to *Robinson* should be to consider not only the relevant agency’s position on the matter, but also the primary purpose of the anti-retaliation provisions.¹³⁹ For the relevant agency position, the *Berman* court was correct in looking to the Securities and Exchange Commission for guidance on the interpretation of the statute.

A. Deference to the Securities and Exchange Commission: Sufficient Ambiguity Allows the Commission’s Ruling to Take Effect

According to *Robinson*, if the statute is found to be “necessarily ambiguous,” the court may analyze each section “to determine whether the context gives the term a further meaning that would resolve the issue in dispute.”¹⁴⁰ Furthermore, if there is not an “unambiguously expressed intent of Congress . . . [on] the precise question at issue,” then the statute is sufficiently ambiguous enough to warrant deference to the relevant agency’s interpretation under *Chevron*.¹⁴¹

¹³⁴ *Id.* at 346.

¹³⁵ See 15 U.S.C. § 78u-6(h)(1).

¹³⁶ See *id.*

¹³⁷ 15 U.S.C. 78u-6(h)(1)(A)(iii) (2016).

¹³⁸ *Id.*

¹³⁹ See *Robinson*, 519 U.S. at 346.

¹⁴⁰ *Id.* at 343–44.

¹⁴¹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837, 842–43 (1984).

This method is the same that the *Berman* court followed, looking to the Securities and Exchange Commission's recent rule speaking to the exact statute in question.¹⁴² After contradictory rulings by federal district courts, the Commission promulgated a rule in 2011 under the agency's authority attempting to provide guidance for future conflict on interpretation of the statute. The Commission's Rule 21F-2(b)(1) states that an individual who reports potential securities laws violations internally to the company is also protected under the Dodd-Frank Act's anti-retaliation provisions, even though the individual did not report to the SEC.¹⁴³ This is the rule that the *Berman* court followed based on its finding that the statute was sufficiently ambiguous to warrant *Chevron* deference.¹⁴⁴

In the future, courts should follow the advice of the *Robinson* court and the actions of the *Berman* court and give deference to the Securities and Exchange Commission. Based on Rule 21F-2(b)(1), courts should hold that the Dodd-Frank Act does afford protections to those individuals who report potential violations internally to the company.

B. Why Policy Matters: Keeping Market Integrity Post-Enron Scandal by Encouraging Whistleblowers to Come Forward with Information

The *Asadi* court explicitly focused on interpreting the statute using the statute's plain language.¹⁴⁵ Although it briefly mentioned the purpose of the statute itself, it did not analyze the legislative intent behind the statute. In fact, the court never mentioned the fact that the particular sub-subsection in question, § 78u-6(h)(1)(A)(iii), was added on a different draft than the two previous sub-subsections.¹⁴⁶

On the other hand, the *Berman* court looked at more than just the plain language of the statute. As noted above, the particular subsection in question was added on a different draft than the other two sub-subsections.¹⁴⁷ The *Berman* court noted this and explained that there is little to no legislative history as to why this was later added.¹⁴⁸ Because there is no legislative history referencing the particular subsection, the court inferred that the addition was likely the product of legislative bundling.¹⁴⁹ It is not unlikely that the problem the cross-referenced subsection posed was merely overlooked in the passage of the statute. Without an in-depth look at what the anti-retaliation provisions in the Sarbanes-Oxley Act specifically stated, it would easily seem to be consistent with the definition of "whistleblower" set forth in 15 U.S.C. 78u-6(a)(6).

¹⁴² See *Berman v. Neo@Ogilvy L.L.C.*, 801 F.3d 145, 155 (2d Cir. 2015).

¹⁴³ 17 C.F.R. § 240.21F-2(b)(1) (2016).

¹⁴⁴ *Berman*, 801 F.3d at 155.

¹⁴⁵ *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013).

¹⁴⁶ This fact, however, was mentioned by the *Berman* court. See *Berman*, 801 F.3d at 152-53.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 152.

¹⁴⁹ See *id.*

This recognizes the practical effects of legislation and what happens as a bill is developed. When an additional subsection is added, the legislature may not necessarily go back to ensure that it does not conflict with other subsections in a large statute. The *Berman* court cited this as the reason for the discrepancy between the statutory definition and the statutory protections provided by Dodd-Frank.¹⁵⁰ While the majority in *Berman* allows this interpretation to carry the day, the dissent argues otherwise. The dissent notes that this is an assumption that the majority is making, not necessarily a fact.¹⁵¹ Further, the dissent notes that because there is no legislative history, there is no way for the majority to cite this as the reasoning.¹⁵²

Analyzing the congressional intent when interpreting a statute provides the court justification behind the statute. Furthermore, using legislative history allows the court to read into the policy arguments surrounding Congress' passing of the statute. In fact, the policy arguments behind including those who report internally under the anti-retaliation provisions help prove that *Berman* provided the correct outcome.

In this particular situation, the policy behind the statute is unduly important. The financial disasters of the early 2000s left the public with little confidence in the accountability of large publicly held companies. With millions of dollars of shareholder value lost and thousands of jobs gone, the financial industry needed reformation. Both the Sarbanes-Oxley Act and the Dodd-Frank Act are aimed at increasing accountability and transparency in the financial industry, with specific sections aimed at encouraging those who work at these large, publicly held firms to report suspicious activity. Not only do the statutes encourage individuals to report potential securities law violations to the Securities and Exchange Commission, but they also encourage individuals to make internal reports to supervisors at the companies where they work. In fact, as stated above, some of the provisions require that individuals report internally before they take the information to the Commission. Theoretically, this would allow the company to fix a problem at the earliest notice possible.

In light of the public sentiment after the crises in the early 2000s, these statutes were seen as beneficial not only to the public, but also to the industry. Employees were now encouraged to blow the whistle on their employers, trying to stop securities law violations sooner, rather than later in an effort to minimize damages to stockholders and the general public. The Dodd-Frank Act was passed in 2010 in part to continue encouraging employees to report wrongdoing that they have discovered in the course of their employment. The Securities and Exchange Commission established the Office of the Whistleblower in July of 2010 to provide

¹⁵⁰ *Id.* at 155.

¹⁵¹ *Id.* at 157 (Jacobs, J., dissenting).

¹⁵² *Id.* at 158.

funding for the incentive programs created by Dodd-Frank.¹⁵³ The fund is provided for by taking a portion of what the Commission recovers from punitive damages.¹⁵⁴ Over the past few years, the fund has paid out more than fifty million dollars to whistleblowers.¹⁵⁵

Whistleblowers serve an essential function—they keep fraudulent activity at bay in order to ensure there is never another Enron disaster. Transparency in the system needs to be encouraged through the Securities and Exchange Committee and its programs.

CONCLUSION

In the coming years, it is likely that the Supreme Court will take this matter into consideration and resolve the dispute among the circuits. Furthermore, it is likely that circuits will continue to make decisions with regard to the interpretation of the statute, aligning with either the Fifth Circuit or the Second Circuit.

Based on the policy implications behind the statute, the circuit courts, as well as the Supreme Court, should side with *Berman* and hold that an individual need report the potential securities law violations only internally to the company he or she works for in order to be afforded the protections of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. A court in this situation can hang its hat on the example of *Robinson*, applying its extension of the definition of “employee” to the definition of “whistleblower.”

The courts may also focus on the policy arguments behind the Dodd-Frank Act’s anti-retaliation provisions. One of the main goals of the Dodd-Frank Act is to encourage those who have information to come forward and reveal the wrongdoings that they have discovered. Without the anti-retaliation protections, it is unlikely that the trend toward reporting will continue because employees will be scared of being demoted, or worse, losing their jobs.

The financial industry, its shareholders, and employees need the protections afforded to whistleblowers to be as expansive as possible. In order to prevent another Enron fiasco, wrongdoings need to be brought to light at the first possible opportunity. Employees need to know that they may feel confident in their legal protections with regard to whistleblowing. Because of this, and because the statute is reasonably ambiguous, deference should be given to the SEC, and the Dodd-Frank and Sarbanes-Oxley protections should be considered inclusive of those individuals who report only internally.

¹⁵³ *Office of the Whistleblower: Frequently Asked Questions*, SEC.GOV, <https://www.sec.gov/about/offices/owb/owb-faq.shtml> [<https://perma.cc/Z3CZ-42UH>] (last visited Nov. 11, 2016).

¹⁵⁴ *Id.*

¹⁵⁵ Dallas Hammer & Jason Zuckerman, *Taking Stock of the Success of Dodd-Frank’s Whistleblower Provisions*, GOV’T ACCOUNTABILITY PROJECT (July 21, 2015), <https://www.whistleblower.org/blog/125021-taking-stock-success-dodd-frank’s-whistleblower-provisions> [<https://perma.cc/BV64-NA6Q>].

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